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IN THE

Supreme Court of the United States.

Term, 1934. No. .

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,
Petitioners,

v.

LAURA A. WASHINGTON, COMPLAINANT, AND EDWARD WELLS AND RICHARD F. ENNIS, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $2,901,236.01,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania and of Robert G. Funkhouser, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Decrees Below.

Your petitioners are the Secretary of Banking of the Commonwealth of Pennsylvania, receiver of Chester County Trust Company, and Robert G. Funkhouser, his deputy receiver.

The decree which your petitioners seek to have this court review is a final decree of the United States Circuit Court of Appeals for the Third Circuit, entered September 28, 1934, affirming the decree of the United States District Court for the Eastern District of Pennsylvania entered August 30, 1933, appointing receivers, the decree of the District Court entered September 22, 1933, changing the designation of the appointees to "temporary receivers", and the decree of the District Court entered October 4, 1933, dismissing the defendants' petition to vacate the appointment of receivers and overruling the defendants' motion to dismiss the bill of complaint. All of these decrees were in a suit entitled and numbered on the docket of the District Court, Laura A. Washington v. William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, June Term, 1933, No. 7845. The suit was in equity and sought the appointment of receivers "to take charge of, conserve and administer all of the assets comprising" a mortgage trust fund formerly conducted by Chester County Trust Company and since its closing conducted by the Secretary of Banking of Pennsylvania as receiver of the trust company.

The Secretary of Banking contends that the decree of the District Court and the decree of the Circuit Court of Appeals affirming it are erroneous because (1) they seek to divest the Commonwealth of Pennsylvania of the administration of trust assets assumed before the institution of this proceeding under express statutory authority conferred on its Secretary of Banking and its courts; and (2) the District Court has appointed trustees, in the guise of receivers, in pursuance of a bill which discloses no neces-

sity for a receiver, without waiting for an answer to be filed, without ascertainment of the facts, and without notice to any party in interest except the plaintiff.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the appeal of the Secretary of Banking from the decree of the District Court and the questions for review before this court are:

1. The Secretary of Banking became the receiver of a closed trust company in accordance with express statutory authority and took possession of a mortgage trust fund formerly conducted by it. Pending the delivery of the trust fund to a new trustee appointed by the court of common pleas as directed by the statute, can a Federal court divest the Commonwealth of its possession and control, by the appointment of receivers?

2. When the Secretary of Banking takes possession of the business and property of a bank and files with the court of common pleas a certified copy of his certificate of possession, does he become subject to the jurisdiction of that court as provided by the statute, or must the court enter a formal decree with respect to each asset before it is brought within its jurisdiction?

3. Is the appointment of receivers to wrest possession and control of a mortgage trust fund from the Commonwealth of Pennsylvania, a violation of the Eleventh Amendment to the Constitution of the United States.

4. Did the District Court abuse its discretion by hastily appointing trustees of a mortgage trust fund in the guise

of receivers, upon a bill which shows no need for receivers, without waiting for an answer to be filed to the bill, without ascertaining the facts, and without notice to the parties in interest?

(c) The Statutes Involved.

Challenge of the jurisdiction of the Federal court in this case involves Section 24 of the Judicial Code, as amended (R. S. Secs. 563, 629; 28 U. S. C. A. Sec. 41 (1)).

The right of the Commonwealth of Pennsylvania to control exclusively through its Secretary of Banking and its courts a mortgage trust fund formerly conducted by a trust company now closed, is given by the Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, called The Department of Banking Code. Pertinent sections of this act are set forth at page 35 in the Appendix to the brief.

(d) Statement of Facts.

1. On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, located in West Chester, Chester County, Pennsylvania. He filed a certificate of possession in his office at Harrisburg, and on February 15th filed a certified copy of that certificate in the office of the prothonotary of Chester County who indexed it in the judgment index. All of this was in accordance with the requirements of the Act of June 15, 1923, P. L. 809, known as The Banking Act 1923. (R. 137.)

2. The Secretary of Banking then entered on his duties as a receiver under the jurisdiction of the Court of Common Pleas of Chester County, as provided by The Banking

Act of 1923. Among the "business and property" of which the Secretary took possession was a trust fund, consisting of a group of mortgages held by the trust company as a trustee, against which it had issued participation certificates. The face value of this pool was $1,742,404.91. (R. 138.)

3. On July 3, 1933, the Act of May 15, 1933, P. L. 565, known as The Department of Banking Code became effective, repealing the Banking Act of 1923. This code recited the duties of the Secretary of Banking as a receiver of closed institutions and particularly described his duties and the rights of interested parties with respect to mortgage trust funds or pools. The text of the sections dealing with mortgage trust funds or pools is set forth at page 39 in the Appendix to our brief. This act provides in section 701:

> "Except as otherwise provided in this act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court."

4. The Secretary of Banking in pursuance, first of The Banking Act of 1923, and then of the Department of Banking Code, has conducted the mortgage trust fund from February 14, 1933, when he took possession of the trust company, to the present.

5. On August 25, 1933, a bill was filed in the District Court of the United States for the Eastern District of Pennsylvania, in behalf of Laura A. Washington, a citizen of Connecticut, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust

Company". The bill stated that the plaintiff owned an interest in the mortgage trust fund (which interest was about one-fifth of one per cent. thereof). The only complaints were that "little effort is made to secure the collection of interest", that "little effort is being made to compel the payment of taxes", and that unless a receiver is appointed "the interest on said mortgages will continue in default and the taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of the complainant and others holding like certificates". There was no charge of improper conduct or of mismanagement. The bill prayed for the appointment of a receiver of the pool, for an order on the defendants to turn over all the assets and records of the pool to the receiver, and for authority to the receiver to collect mortgage interest, to demand the payment of taxes and to bring suit for the collection of principal. (R. 9.)

6. On August 28 the plaintiff's attorney filed a motion for the appointment of a receiver. (R. 1.) On August 29, 1933, the subpœna was served on the defendants. (R. 2.)

7. On August 30, 1933, one hour after telephone notice to the defendants' counsel, Judge Welsh held a hearing on the motion. He refused to give the defendants' counsel opportunity for further consideration, and upon his offer to submit a brief stated that no brief was necessary. On the same day, without waiting for an answer to be filed, without taking testimony, and without any notice to those interested in the trust fund other than the plaintiff, Judge Welsh appointed two "receivers" of the assets of the trust. (R. 49.) The order directed the receivers "to hold and preserve" all the assets and to "make quarterly reports to this court". It authorized the receivers to collect principal and interest by suit or otherwise, to employ agents

and to pay out money for the preservation of the assets. (R. 15.)

8. On September 1, 1933, the two receivers with two other receivers, named under similar circumstances for another mortgage trust fund of the same trust company, accompanied by two attorneys, appeared at the office maintained by the Secretary of Banking as receiver of the trust company and demanded possession of all assets and records of the trust. Possession was refused by two subordinates then on duty. (R. 49.) The proceedings in the other mortgage trust fund just referred to are the subject of a petition for certiorari now before this Court.

9. On September 2, 1933, the Saturday before Labor Day, Judge Welsh, on petition by his receivers, allowed a rule to show cause why the deputy receiver and his subordinates should not be adjudged in contempt. (R. 24.)

10. On September 4, 1933, on a bill of complaint filed by a mortgage trust fund certificate holder, the Court of Common Pleas of Chester County ordered an injunction to issue restraining your petitioners from delivering any assets or records of the trust fund to any persons appointed receivers by the United States District Court, pending further order from the Court of Common Pleas of Chester County. (R. 32.) This injunction was issued and served on the deputy receiver. (R. 31.)

11. On September 5, 1933, the three persons named in the contempt proceedings appeared before Judge Welsh. There were filed then an answer to the contempt petition (R. 29), a motion to dismiss the bill (43) and a petition to vacate the appointment of the receivers (46). No further steps have been taken in the contempt proceedings.

12. On September 22, 1933, Judge Welsh of his own motion entered a decree amending the former decree so as to make his appointees "temporary receivers" (R. 55) and caused the original decree to be altered by inserting the word "temporary" throughout with pen and ink. (R. 15.)

13. On October 4, 1933, Judge Welsh filed an opinion (R. 66) and a decree (R. 73) dismissing the prayer to vacate and overruling the motion to dismiss.

14. Judge Welsh refused to allow an appeal and a supersedeas (R. 76), and these were allowed by the Circuit Court of Appeals for the Third Circuit (R. 87).

15. On January 4, 1934, the Circuit Court of Appeals heard argument on the appeal. At the argument the owners of $1,716,684.70 of the trust fund filed a petition for leave to intervene and stated their active opposition to a Federal receivership (R. 103). No other certificate holder has been made a party to this proceeding or has appeared in it. On September 28, 1934, the Circuit Court of Appeals filed an opinion (R. 136) and entered an order (R. 149) affirming the decrees of the District Court.

(e) Rulings of the Court Below.

In affirming the decrees of the District Court appointing receivers, later appointing temporary receivers, dismissing the petition to vacate the order appointing receivers and overruling the motion to dismiss the bill, the Circuit Court of Appeals for the Third Circuit ruled:

(1) That the District Court could appoint temporary receivers of a mortgage trust fund to replace the Secretary of Banking, pending the appointment of a substituted trustee by the Court of Common Pleas.

(2) That the Court of Common Pleas of Chester County had not acquired jurisdiction of all the assets held by the Secretary of Banking as receiver.

(3) That the District Court had not violated the Eleventh Amendment to the Constitution of the United States.

(4) That the District Court had not abused its discretion in appointing the receivers.

B. REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of other circuits the review of which has been refused by this Court. It has not differentiated between receivership proceedings affecting assets of the ordinary business or commercial corporation and those of a quasi-public corporation.

Amos v. Trust Co., of Florida, 54 F. (2d) 286 (1931) C. C. A. Fifth Circuit. Certiorari refused. 285 U. S. 559.

Mitchell v. Lay, 48 F. (2d) 79 (1930) C. C. A. Ninth Circuit. Certiorari refused. 283 U. S. 864.

2. The decision of the Circuit Court of Appeals is opposed to the public policy of the Commonwealth of Pennsylvania and is in direct conflict with the decision of its Supreme Court to the effect that a Federal court has no jurisdiction to appoint receivers to interfere with the liquidation of the business of a quasi-public corporation chartered, supervised and regulated by the state.

Commonwealth v. Penn General Casualty Co., 316 Pa. 1 (1934).

3. The Circuit Court of Appeals has upheld the District Court in making available the remedy of a receivership as a weapon of coercion and a means for the frustration of the public policy of the state as expressed in its statutes and universally followed in every other case in the state:

Shapiro v. Wilgus, 287 U. S. 348 (1932).

4. From the time the Commonwealth of Pennsylvania first established its system for the regulation, supervision and liquidation by the Department of Banking of its banks and building and loan associations until the decision in *Commonwealth of Pennsylvania v. John G. Williams et al., Receivers of Mortgage Building and Loan Association* (certiorari allowed October 22, 1934; October Term, 1934, No. 394) it had been generally understood and believed throughout the Commonwealth that quasi-public institutions chartered by the state were not subject to the equity jurisdiction of the Federal courts. Certainly before the instant case the appointment of Federal receivers for assets in the hands of the Secretary of Banking as the statutory receiver of a closed state trust company was altogether unheard of and not considered to be within the bounds of possibility.

5. The Circuit Court of Appeals has sustained the action of the District Court which attempts to deprive the Commonwealth of Pennsylvania of its sole control of property exercised under state law through its authorized administrative officer and under the supervision of its courts, for months before the bill was filed in the Federal court.

6. The assumption of jurisdiction by the District Court under circumstances plainly showing anxiety on the part of the appointing judge to oust the state officer for the sole

purpose of seating the court's nominees, creates in the Commonwealth of Pennsylvania for the first time an impossible situation. If the decision of the Circuit Court of Appeals is not reversed, no function of the Secretary of Banking exercised by virtue of state law, no asset of a state quasi-public institution entrusted by state law to him or to any other statutory officer, and no trust fund in the hands of such officer or of any private person occupying the position of a fiduciary and accountable to state courts, will be safe from Federal receivership proceedings.

7. The jurisdictional question involved concerns an unnecessary and unjustified interference with the sovereign rights of a state, and is in that respect akin to the questions involved in two other cases in each of which a writ of certiorari has been allowed by this Court.

Commonwealth of Pennsylvania v. John G. Williams et al., October Term, 1934, No. 394.
Gordon, Secretary of Banking, v. Joseph Ominsky et al., October Term, 1934, No. 395.

8. The jurisdictional question is of paramount public importance. It involves a contest between the powers of the Federal court and the powers of a state exercised through its courts, and its Secretary of Banking. In this case each court by affirmative decree has claimed jurisdiction of the property in controversy.

9. Contrary to the express provisions of the Eleventh Amendment, the District Court has construed its power to extend to a proceeding against a state, has interfered with a state officer in the discharge of his statutory duty and has employed contempt proceedings against that officer's subordinates.

10. The District Court judge abused his discretion and violated fundamental principles of equity by appointing trustees, under the guise of "temporary receivers," without allowing an answer to be filed, without ascertaining the facts, without giving notice to the parties in interest, and upon averments plainly insufficient to justify the appointment of receivers.

11. The courts below have decided an important question of general law in a way that is untenable. It is imperative that this Court promptly and finally settle a conflict existing between the jurisdictions asserted by the state and Federal courts. This settlement is necessary in order (a) that there may be effective and unhampered administration of the banking, building and loan association and insurance laws not only of Pennsylvania but of all other states which have set up systems for the governance of corporations subject to similar laws; and (b) that protection may be afforded to every kind of trust, no matter who are the trustees, from those who will seek from the Federal courts the appointment of trustees, under the guise of receivers, but without the safeguards attending the appointment of trustees by the state courts which alone should have jurisdiction over such trusts. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. PRAYER FOR WRIT OF CERTIORARI.

Wherefore your petitioners respectfully pray:

(a) That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the cause therein entitled "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company v. Laura A. Washington, Complainant, and Edward W. Wells and Richard F. Ennis, Receivers of Trust Fund Mortgages Aggregating $2,901,-236.01 Against Which Certificates Were Issued by Chester County Trust Company," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, c. 517 (26 Stat. 826-828), amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 USCA 347).

(b) That such remedy in the premises be decreed as to this Court may seem appropriate and in conformity with said act; that the decrees of the United States Circuit Court of Appeals for the Third Circuit in said cause, and of the District Court of the United States for the Eastern District of Pennsylvania, and each and every part thereof may be reversed by this Court, and said courts below directed to dismiss the bill in equity and to vacate

the decree appointing Edward W. Wells and Richard F. Ennis, temporary receivers of the mortgage trust fund or pool formerly conducted by the Chester County Trust Company and now conducted by the Secretary of Banking of the Commonwealth of Pennsylvania.

(c) That this Court may make such further order and direction in the premises as may be in accordance with the law to be applied to the facts in this case.

And your petitioners will ever pray, etc.

WILLIAM D. GORDON,
Secretary of Banking of the Commonwealth of Pennsylvania.

ROBERT G. FUNKHOUSER,
Special Deputy as Agent in Possession of Chester County Trust Company.

WM. A. SCHNADER,
Attorney General,
Commonwealth of Pennsylvania.

HAROLD D. SAYLOR,
Deputy Attorney General.

SHIPPEN LEWIS,
Special Deputy Attorney General.

JOSEPH K. WILLING,
Special Attorney.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

WILLIAM D. GORDON, being first duly sworn, says that he is the Secretary of Banking of the Commonwealth of Pennsylvania, that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein of his own knowledge are true, and the facts stated on information received from others are averred on information received from reliable sources and he verily believes them to be true; and that as Secretary of Banking he is duly authorized to file this petition and apply for a writ of certiorari as therein prayed for.

WILLIAM D. GORDON.

Sworn to and subscribed before me this twenty-third day of November, 1934.

ANNA M. DORNAN,
Notary Public.
My commission expires April 1, 1935.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The court is respectfully referred to the brief in support of the petition for certiorari in William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Petitioners, v. Mary A. O'Brien, Complainant, and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91, Respondents. The stipulation of counsel (R. 4) shows that the facts of the two cases are substantially the same. Each of the lower courts has filed one opinion covering both cases.

At the argument of the present case before the Circuit Court of Appeals, a petition for leave to intervene was filed by the owners of $1,716,684.70 of the trust fund, stating their active opposition to a Federal receivership.

Respectfully submitted,

WILLIAM A. SCHNADER,
Attorney General,
Commonwealth of Pennsylvania.
HAROLD D. SAYLOR,
Deputy Attorney General.
SHIPPEN LEWIS,
Special Deputy Attorney General.
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